A

ASIA PACIFIC INFORMATION SERVICES SDN BHD

v.

CYCLE & CARRIAGE BINTANG BHD & ANOR

B

HIGH COURT MALAYA, KUALA LUMPUR
MAH WENG KWAI JC
[SUIT NO: D1-22-204-2008]
10 FEBRUARY 2010

C ***CONTRACT:*** *Breach - Contract for purchase of car - Claim for refund of purchase price - Implied condition of merchantable quality and fitness - Whether breached - Whether contract could be rescinded - Special and general damages - Loss of user*

D ***SALE OF GOODS:*** *Motor car - Claim against car dealer - Claim for refund of purchase price - Implied condition of merchantable quality and fitness - Whether breached - Whether contract could be rescinded - Special and general damages - Loss of user*

E This was a claim by the plaintiff for the refund of RM382,948, being the purchase price of a Mercedes Benz Avantgarde together with damages, interests and costs, from the 1st defendant. The plaintiff purchased the car for the exclusive use of its Chief Executive Officer ('PW1'). It was averred that due to several mechanical, electronic and/or electrical problems encountered, the F car was of unmerchantable quality, unfit for purpose and had material inherent latent defects rendering it unroadworthy and unsafe to drive and that the defendants were in breach of contract. Besides the claim for the refund of the general purchase price and special damages, the plaintiff also claimed general damages for G "discomfort, inconvenience, extra expenditure, distress, anxiety and severe embarrassment". The defendants denied the alleged breaches and contended that the car was sufficiently and properly repaired under the terms and conditions of the Manufacturer's Warranty. The issues requiring determination were: (i) whether the car purchased H by the plaintiff was defective and not of merchantable quality in breach of the terms and conditions of the contract of sale; and (ii) whether the defendants, if liability was established, were also liable for special damages and for loss of user for the days the car was in the defendants' workshop.

I

Held (dismissing the claim with costs):

(1) It could not be said that the defendants had breached the implied condition of merchantable quality and fitness. The problems encountered, although not minor, were not sufficiently serious or fundamental to amount to a breach of the implied condition at the time of the sale. The car after repair was in good condition and was roadworthy, and could not be said to be "of no use" as a car in the ordinary usage by the plaintiff. The car was in a useable condition and, thus, merchantable. The plaintiff's choice not to collect the car from the defendant's workshop was a unilateral decision because PW1 had lost confidence in the "Mercedes Benz brand of car" and not because the car was not functioning at all. (para 28)

(2) The problems were encountered by the plaintiff during the validity of the Manufacturer's Warranty period. Pursuant to cls. 6 and 7 of said Warranty, the 1st defendant's liability was limited to repairs or replacement of parts. The defendants had discharged their contractual liability and, accordingly, the plaintiff could not rescind the contract on the ground of a fundamental breach of contract by reason of the unroadworthiness of the car and claim for damages. The plaintiff could only bring an action for damages against the 1st defendant if the 1st defendant had refused or neglected to remedy or had not succeeded in remedying the failure within a reasonable time. In this case, the 1st defendant had sufficiently and properly repaired the car for the plaintiff in that the Electric Ignition System, the "Stepper Motor" and "air conditioner evaporator housing" had been replaced. (para 29)

(3) The plaintiff had failed to prove its case on a balance of probabilities against both the defendants. Without being able to establish liability, the plaintiff would of course not be entitled to any damages. In any event, the plaintiff had also failed to prove loss of user since a courtesy car similar to the one purchased by the plaintiff was provided by the 1st defendant for PW1's use. Finally, as the plaintiff was a corporation, there was no question of any damages suffered by the plaintiff by reason of "discomfort, inconvenience, distress, anxiety and severe embarrassment". (paras 33 & 34)

Case(s) referred to:
Bartlett v. Sidney Marcus Ltd [1965] 1 WLR 1013 ***(refd)***
Eastern Supply Co v. Kerr [1974] 1 MLJ 10 ***(refd)***
Goh Hooi Yin v. Lim Teong Ghee & Ors [1975] 1 LNS 44 HC ***(refd)***
Karsales (Harrow) Ltd v. Wallis [1956] 2 All ER 866 ***(refd)***
Lau Hee Teah v. Hargill Engineering Sdn Bhd & Anor [1979] 1 LNS 40 FC ***(refd)***
Mac Ewan & Co Ltd v. Ashwin [1916] NZCR 1028 ***(refd)***
Seng Hin v. Arathoon Sons Ltd [1968] 1 LNS 134 FC ***(refd)***
Union Alloy (M) Sdn Bhd v. Syarikat Pembenaan Yeoh Tiong Lay Sdn Bhd [1993] 3 CLJ 670 HC ***(refd)***

Legislation referred to:
Consumer Protection Act 1999, s. 52(2)
Sale of Goods Act 1957, ss. 16(1)(a), (b), 41

Sale of Goods Act 1908 [NZ], s. 16(b)

For the plaintiff - Alvin Loo (Noor Akhza with him); M/s Hing & Alvin
For the defendants - David Lingam (Dapinder Kaur with him); M/s David Lingam & Co

Reported by Suresh Nathan

JUDGMENT

Mah Weng Kwai JC:

[1] The plaintiff claims for the refund of RM382,948 from the 1st defendant being the purchase price of a Mercedes Benz E280 Avantgarde together with damages, interests and costs. The plaintiff purchased the car on 19 June 2007 for the exclusive use of its Chief Executive Officer (CEO). The plaintiff claims that due to the several mechanical electronic and/or electrical problems encountered, the car is of unmerchantable quality, unfit for purpose and had material inherent latent defects rendering the car unroadworthy and unsafe to drive and that the defendants are in breach of contract.

[2] The defendants deny the alleged breaches and contended that the car was sufficiently and properly repaired under the terms and conditions of the Manufacturer's Warranty.

The Plaintiff's Case

[3] The plaintiff purchased the car when it was about six months pre-owned by the 1st defendant and had about 600 kms on its odometer. Besides the purchase price, the plaintiff paid the sum of

RM11,652.87 for motor insurance, RM830 for transfer fee and handling charges and RM2,000 for the tinting of the wind screen and windows.

[4] The plaintiff took possession of the car on 19 June 2007. Subsequently, the car developed the following problems:

Date of breakdown	Nature of Problem	Period in Workshop
(i) 21 October 2007	Faulty Electronic Ignition System (EIS) and Instrument Cluster.	22 October 2007 - 1 November 2007
(ii) 25 November 2007	Faulty Battery "Low Voltage' and Car Key Ignition	26 November 2007 - 28 November 2007
(iii) 3 December 2007	Faulty air conditioner	4 December 2007 - 10 December 2007
(iv) 10 December 2007	Strange sounds from air conditioner	10 December 2007 - now

[5] As a result of the problems encountered and the alleged latent defects, the plaintiff claimed that it was a danger to drive the car on the road as it was unroadworthy.

[6] Besides the claim for the refund of the purchase price and special damages, the plaintiff also claims for general damages for "discomfort, inconvenience, extra expenditure, distress, anxiety and severe embarrassment caused to the plaintiff."

The Defendants' Case

[7] The defendants deny that the car was defective or was unroadworthy, of unmerchantable quality or unfit for purpose.

[8] The defendants averred that in any event the terms and conditions of the Manufacturer's Warranty applied and that the car had been properly repaired by the defendants.

[9] The defendants further averred that the plaintiff has failed to prove its case on liability as well as on the quantum of damages.

Issues To Be Tried

Essentially, there are two main issues to be determined by the court namely:

[10] Whether the car purchased by the plaintiff was defective, had material inherent latent defects and was not of merchantable quality and unfit for purpose in breach of the terms and conditions of the contract for sale.

[11] Whether the defendants, if liability is established, are also liable to pay special damages in the sum of RM14,982.87 and for loss of user at RM700 per day for the days the car was in the defendants' workshop, in addition to the refund of the purchase price.

Findings By The Court

[12] Having read the written statements of the witnesses, heard the oral evidence, read the documents and the written submissions of both counsel for the plaintiff and defendants, I arrived at the following:

[13] The CEO of the plaintiff Lee Chuan Yew (PW1), for whose exclusive use the car was purchased, took possession of the car personally on 19 June 2007 after making a 'Pre Delivery Inspection' (encl. 8 Ikatan Dokumen – Page 1 Borang Akuan Penerimaan Kenderaan). The car was found to be in good order. Section 41 of the Sale of Goods Act 1957 (Revised 1989) (SGA) provides that unless and until a buyer has had a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract, he is not deemed to have accepted the goods. In this case as PW1 had the reasonable opportunity to inspect the car before taking delivery of it, I hold that the plaintiff had in fact accepted the car unconditionally on 19 June 2007.

[14] PW1 used the car for about four months travelling over 18,000 kms before the car broke down for the first time on 21 October 2007. The car clocked another 3,000 kms after the first repairs and before it was sent in to the defendants' workshop for the fourth and last time on 1 December 2007. At no time did the

defendants neglect and/or refuse to repair the car according to the terms and conditions of the Manufacturer's Warranty on the four occasions that the car was sent to the defendants' workshop.

[15] The burden of proof lies on the plaintiff to prove its case on a balance of probabilities. The onus of proving unmerchantability and unfitness of purpose of the car lies specifically on the plaintiff, the buyer. In an attempt to do so, the plaintiff called two witnesses, the CEO (PW1) himself and his driver (PW2).

[16] PW1 as the CEO of the plaintiff is a businessman. By his own evidence PW1 admitted that he has no technical qualification or experience in mechanical or automobile engineering. PW1 had highlighted the mechanical, electronic and/or electrical problems encountered as an ordinary lay person without any knowledge or expertise in the mechanical, electronic and/or electrical defects complained of. All that PW1 could say was that he felt certain the car was unsafe for use or to be driven on the roads. In submission counsel for the plaintiff went on to say that "only the driver of the car would have the instinct or intuition to feel such fear and anxiety when driving the car." In answer to Question No. 159 in his cross examination, PW1 agreed that neither the plaintiff, PW2 nor himself were competent to carry out or make any acceptable evaluation of the car. And in answer to Question 160, PW1 also agreed that his averments and allegations of fear and anxiety were conjecture and speculative.

[17] The plaintiff did not call any technical witness or tendered any expert report or opinion to help determine the cause or causes of the problems encountered, the nature of repairs or replacement of parts required and the overall condition of the car during the months from October to December 2007 and a reasonable period thereafter. Other than pleading that the car had "material inherent latent defects" no evidence was adduced at all to prove that the defects encountered were in fact materially inherent latent defects in the car. The plaintiff had the financial means and opportunity to have the condition of the car assessed independently and to tender the findings in court. However the plaintiff omitted or failed to do so. Had the plaintiff done so and an expert had found that those defects were so serious or fundamental which in his opinion made the car unroadworthy, a claim for a breach of the implied condition under s. 16(1)(a) of the SGA may well be successful. The four preconditions for s. 16(1)(a) of the SGA to apply have been

succinctly set out by Zakaria Yatim J in *Union Alloy (M) Sdn Bhd v. Syarikat Pembenaan Yeoh Tiong Lay Sdn Bhd* [1993] 3 CLJ 670 namely:

> the buyer must make known to the seller the particular purpose for which the goods are required, there must be shown reliance by the buyer on the seller's skill and judgment and the buyer must in fact rely on the seller to supply suitable goods, the goods must be of a description which it is in the course of the seller's business to supply, if the goods are specific they must not be sold under their patent or trade name.

Unfortunately for the plaintiff the unmerchantable quality and unfitness of purpose of the car cannot be proven merely by relying on how PW1 as a driver felt about driving the car.

[18] PW2, PW1's driver of 25 years, gave evidence on the condition of the car from the day it was purchased till the day he left it at the defendants' workshop on 4 December 2007. Unfortunately again, PW2 being a non-mechanical and/or automobile engineering person, could not shed any light on the gravity of the problems encountered.

[19] The defendants on the other hand called two witnesses to prove that the car was roadworthy, was of merchantable quality and was fit for purpose. DW1, S.V. Balasubramaniam was and is at all material times, an automobile engineer employed by the 1st defendant as its Central Manager – After Sales, while DW2 Rudolf Fuchslocher was and is at all material times, also an automobile engineer of 40 years experience with Mercedes Benz, employed by the 1st defendant as its Automobile Engineer. Both DW1 and DW2 were called as witnesses of fact and DW2 at least, was put forward as an expert witness as well. In their evidence both witnesses confirmed that the car had developed problems with its Electronic Ignition System (EIS), battery low voltage and air conditioning system. Both testified that the problems were rectified and after the necessary repairs the car was functioning well and roadworthy with no recurring problems. Although DW2 was rather evasive when answering some questions in cross examination, I nevertheless accept his evidence as credible when he confirmed that the car has been properly repaired and is roadworthy.

[20] The car was test driven by DW2 and DW1 on 25 January 2010 just one day before the trial and it was found to be in good condition. DW2 was emphatic when he said that the car was absolutely roadworthy and safe to drive.

[21] While agreeing with defence counsel that there was no damage or defects to the engine or any other major parts of the car, I cannot agree that the problems encountered were minor. The faulty EIS and Instrument Cluster did cause the car to stall on the highway and the air conditioner did fail to function. However I am of the view that after the EIS and Instrument Cluster had been replaced and the air conditioning system repaired, the problems had been rectified and were not sufficient to render the car to be of unmerchantable quality or unfit for purpose. At the same time, I am of the view that none of the problems encountered could be attributed to the plaintiff in the manner the car had been used from 19 June 2007 to 4 December 2007 as suggested by the defence.

[22] The defendants had *vide* their letter of undertaking dated 21 December 2007 (exh. P11) assured the plaintiff of the roadworthiness of the car.

[23] Wee Chong Jin CJ in the Singapore Court of Appeal case of *Eastern Supply Co v. Kerr* [1974] 1 MLJ 10 held that the vital issue was whether or not the seller was in breach of the implied conditions under the Sale of Goods Act. The burden lay on the buyer to prove facts which would in law amount to the car being either a) not reasonably fit for the purpose for which it is required or b) of unmerchantable quality.

[24] In the cited case of *Seng Hin v. Arathoon Sons Ltd* [1968] 1 LNS 134 the Federal Court held:

> in order to show that the goods were not of a merchantable quality it had to be shown that the goods **were of no use for any purpose** for which such goods would normally be used and were therefore not saleable under that description.

[25] In the case of *Lau Hee Teah v. Hargill Engineering Sdn Bhd & Anor* [1979] 1 LNS 40 the Federal Court held:

> From the evidence in this case I find that all of the defects were defects **which could be put right** either by replacement of the defective parts or by simple repairs, and they were not defects sufficiently serious to render the loader useless for any purpose for which it would usually be used, and therefore it cannot be said that the loader was of unmerchantable quality or unfit for the Plaintiff's purpose.

[26] The tests of merchantability and of being reasonably fit for the purpose have been propounded by Lord Denning MR in the case of *Bartlett v. Sidney Marcus Ltd* [1965] 1 WLR 1013 in these words:

> I take the tests as to merchantability stated by Lord Wright in *Cammell Laird & Co v. Manganese Bronze and Brass Co. Ltd.* And *Grant v. Australian Knitting Mills Ltd.* In the *Cammell Laird* case, Lord Wright said the goods were unmerchantable if they were "of no use" for any purpose for which such goods would normally be used. In the Grant case he said that merchantable meant that the article, if only meant for one particular use in the ordinary course, is 'fit for that use.' It seems to me that those two tests do not cover the whole ground. There is a considerable territory where on the one hand you cannot say that the article is 'of no use' at all, and on the other hand cannot say that it is entirely 'fit for use.' The article may be of some use though not entirely efficient use for the purpose. It may not be in perfect condition but yet it is in a useable condition. It is then, I think, merchantable.

[27] Cooper J in *Mac Ewan & Co Ltd v. Ashwin* [1916] NZCR 1028 when considering the provisions of s. 16(b) of the New Zealand Sale of Goods Act 1908 which is in *pari materia* to s. 16(1)(b) of our SGA, in a case involving the supply of a cream-separator machine, held that a machine that is of "merchantable quality" is one that is 'reasonably capable of performing the work for which it was designed."

[28] In light of the cited cases it cannot be said that the defendants had breached the implied condition of merchantable quality and fitness. The problems encountered although not minor, were not sufficiently serious or fundamental to amount to a breach of the implied condition at the time of the sale. The car after the repairs was in good condition and was roadworthy and could not be said to be "of no use" as a car in the ordinary usage by the plaintiff. The car was in a useable condition and thus merchantable. The fact that the plaintiff chose not to collect the car from the defendants' workshop on 10 December 2007 was an unilateral decision because PW1 had lost confidence in the "Mercedes Benz brand of car" and not because the car was not functioning at all.

The problems faced by the plaintiff in the present case did not come anywhere close to the problems experienced by the buyer of a car in the case of *Karsales (Harrow) Ltd v. Wallis* [1956] 2 All ER 866. In that case the car at the time of sale was found to be in

excellent condition but on delivery it was found to be in a deplorable condition and incapable of self-propulsion. Denning LJ accordingly held that the breach of the implied condition of merchantable quality of the car was a fundamental breach which went to the root of the contract.

[29] The problems were encountered by the plaintiff during the validity of the Manufacturer's Warranty period. The plaintiff and the 1st defendant are bound to comply with the terms and conditions of the Manufacturer's Warranty (encl. 8A – Ikatan Dokumen Tambahan pp. 1 to 14 at p. 5). Pursuant to cls. 6 and 7 of the Manufacturer's Warranty the 1st defendant's liability is limited to repairs or replacement of parts. I find that the defendants have discharged their contractual liability and accordingly the plaintiff cannot rescind the contract on the ground of a fundamental breach of contract by reason of the unroadworthiness of the car and claim for damages (cl. 10 of the Manufacturer's Warranty). Pursuant to s. 52(2) of the Consumer Protection Act 1999 which provides:

> Where the consumer is entitled by an express guarantee given by the manufacturer to require the manufacturer to remedy the failure by:
>
> (a) repairing the goods; or
>
> (b) replacing the goods with goods of identical type,
>
> no action shall be commenced under paragraph (1)(a) unless the consumer has required the manufacturer to remedy the failure and the manufacturer has refused or neglected to remedy, or has not succeeded in remedying, the failure within a reasonable time.

The Manufacturer's Warranty was an express guarantee given by the 1st defendant to the plaintiff that in the event the condition of the car did not comply with the guarantee, the plaintiff would be entitled to require the 1st defendant to remedy the failure by repairing the car or replacing the car with a similar car. It is only when the 1st defendant has refused or neglected to remedy or has not succeeded in remedying the failure within a reasonable time (s. 52(2)(b)) can the plaintiff bring an action for damages against the 1st defendant. In this case the 1st defendant has sufficiently and properly repaired the car for the plaintiff in that the EIS, the "Stepper Motor" and "air conditioning evaporator housing" had been replaced.

[30] The fact that the car is useable and saleable is amply proven by the evidence of DW3, a used car dealer, who on inspection of the car offered to purchase the same at RM200,000 from the 1st defendant. The letter of DW3's company, Auto Merchants Sdn Bhd dated 25 January 2010 was produced and marked as exh. D22. DW3 went on to say that the open market selling price of the car would be about RM210,000 to RM215,000.

[31] Although the plaintiff had a legitimate and reasonable expectation that the car would be roadworthy and of merchantable quality, the facts of the case did not warrant the plaintiff to reject the car altogether by abandoning it at the 1st defendant's workshop on 10 December 2007 and refusing to collect it thereafter. Once a buyer has accepted or is deemed to have accepted the goods he loses his right to reject for breach of conditions but can only claim for damages. It is always a question of fact whether or not a reasonable time has elapsed so as to preclude a buyer from rejecting the goods. However in this case as I find that the car was not unroadworthy, the issue of whether the plaintiff had rejected the car within a reasonable time does not arise.

Claim For Damages For "Discomfort, Inconvenience, Extra Expenditure, Distress, Anxiety And Severe Embarrassment"

[32] It is trite law that as the plaintiff in this case is a private limited Company, it has its own legal identity and entity. Chan & Koh on *Malaysian Company Law, Principles & Practice*, 2nd edn states:

> A company is a legal fiction, an abstraction with legal but no physical existence. A company has "neither body, parts or passions. Apart from its corporators, it can have neither thoughts, wishes, or intentions, for it has no other mind than the mind of the corporators."
>
> A resultant effect of the theory of independent legal entity is that property of the company which is a going concern belongs to it and not to its members individually or collectively. Generally, a individual member of the company has no property, legal or equitable, n the assets of the company even if the members owns all, or substantially all, of the company shares.

The car is registered in the name of the plaintiff and PW1 as such has no locus to claim for any damages on behalf of himself. Conversely, the plaintiff has no locus to claim for any damages by

reason of "discomfort, inconvenience, extra expenditure, distress, anxiety and severe embarrassment" on behalf of itself or PW1. In the case of *Goh Hooi Yin v. Lim Teong Ghee & Ors* [1975] 1 LNS 44 Arunalandam J held and I agree that a company is a complete legal entity and a completely different person from others or other companies, and directors cannot be equated with the company or *vice versa*. I venture to add that had the plaintiff assigned its rights and liabilities arising in the contract of sale and purchase of the car to PW1, then perhaps PW1 could have successfully claimed for damages for "discomfort, inconvenience, extra expenditure, distress, anxiety and severe embarrassment."

There is no question of PW1 stepping into the shoes of the plaintiff and as pointed out by defence counsel, there is no evidence adduced to show that PW1 was indeed authorized to step into the shoes of the plaintiff when the several paragraphs in the statement of claim referred to PW1 as the plaintiff.

[33] It is thus my finding that the plaintiff has failed to prove its case on a balance of probabilities against both the defendants. Without being able to establish liability, the plaintiff will of course, not be entitled to any damages. Suffice to say that in any event, the plaintiff has also failed to prove loss of user especially from 28 November 2007 to 10 December 2007, as a courtesy car, similar to the one purchased by the plaintiff, was provided by the 1st defendant for the use of PW1. This was confirmed by PW2 although the use of the courtesy car by PW1's family was unknown to PW1.

[34] Lastly as the plaintiff is a corporation, there is no question of any damages suffered by the plaintiff by reason of "discomfort, inconvenience, distress, anxiety and severe embarrassment."

[35] The plaintiff's claim against both defendants is therefore dismissed with costs of RM30,000.